Supreme Court, U.S.
FILED
JAN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CROCKER NATIONAL BANK,
Appellant,

v.

PAUL PERDUE,
Appellee.

On Appeal from the Supreme Court of the State of California

BRIEF OF *AMICUS CURIAE* WELLS FARGO BANK, N.A. IN SUPPORT OF JURISDICTIONAL STATEMENT OF CROCKER NATIONAL BANK

WEYMAN I. LUNDQUIST*
ROBERT E. BORTON
PETER A. WALD
BRIAN P. BROSNAHAN
HELLER, EHRMAN, WHITE & MCAULIFFE
44 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 772-6000
Attorneys for Amicus Curiae Wells Fargo Bank, N.A.
* Denotes Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 4

State Court Regulation of National Bank Service Charge Pricing Is Substantively and Institutionally Inconsistent With the Regulatory Scheme Established by the Federal Banking Laws 4

CONCLUSION 12

TABLE OF AUTHORITIES

Cases	Page
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976)	9
E.I. Du Pont De Nemours & Co. v. *F.T.C.*, 729 F.2d 128 (2d Cir. 1984)	8
F.C.C. v. *RCA Communications, Inc.*, 346 U.S. 86 (1953)	9
First National Bank of La Marque v. Smith, 610 F.2d 1258 (5th Cir. 1980)	6
Franklin National Bank v. *New York*, 347 U.S. 373 (1954)	4
In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983), *cert. granted*, 105 S.Ct. 1863, 85 L.E.2d 157 (April 1, 1985)	8
Independent Bankers Ass'n of America v. *Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980)	5, 6
Investment Co. Institute v. *Camp*, 401 U.S. 617 (1971)	6
Jacobs v. *Citibank, N.A.*, 61 N.Y.2d 869, 462 N.E.2d 1182, 474 N.Y.S.2d 464 (1984)	12
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)	4
Theatre Enterprises, Inc. v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954)	8
United States v. *Grinnell Corp.*, 384 U.S. 563 (1966)	8

FEDERAL STATUTES AND REGULATIONS

12 U.S.C.	
21	5
93(a)	5
93(b)	5
161	5
164	5
221-530	5
481-86	5
1811-32	5
1818(b)	2, 5

FEDERAL STATUTES AND REGULATIONS

	Page
15 U.S.C.	
1	8
2	8
45	8
28 U.S.C.	
1257(2)	12
1257(3)	12
12 C.F.R.	
7.8000	2, 6, 7, 9
7.8000(a)	6
(7.8000(b)	2, 6
7.8000(b)(1)	6, 7
7.8000(b)(2)	6, 7, 9
7.8000(b)(3)	6, 7

PUBLIC LAWS

Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469	5
The Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132	5

COURT RULES

United States Supreme Court Rule 36.1	1

OTHER AUTHORITIES

P. Areeda, *Antitrust Analysis* (3d ed. 1981)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CROCKER NATIONAL BANK,

Appellant,

v.

PAUL PERDUE,

Appellee.

On Appeal from the Supreme Court of the State of California

BRIEF OF *AMICUS CURIAE* WELLS FARGO BANK, N.A. IN SUPPORT OF JURISDICTIONAL STATEMENT OF CROCKER NATIONAL BANK

INTEREST OF *AMICUS CURIAE*[1] WELLS FARGO BANK, N.A.

Wells Fargo Bank, N.A. ("Wells Fargo") is a national bank. As such, it is subject to a variety of federal banking statutes and to the authority and regulations of the Comptroller of the Currency. Wells Fargo does business in the State of California and thus is also subject to the decision appealed herein by Crocker National Bank ("Crocker"). Wells Fargo has a direct and immediate interest in the instant appeal.

---

[1] This brief is timely filed with the written consent of the parties as required by United States Supreme Court Rule 36.1. Such consent documents are being lodged concurrently herewith.

The decision below subjects Wells Fargo and all other national banks operating in California to state court review of the charges levied for deposit account services ("service charges"). Such review is inconsistent with the regulatory scheme established by the federal banking statutes and regulations promulgated by the Comptroller. Title 12 C.F.R. section 7.8000 (1984) requires that service charges be set by each national bank on a competitive basis, in accordance with sound banking judgment and in a manner designed to achieve the statutory goal of a safe and sound national banking system. *See* 12 U.S.C. § 1818(b). Section 7.8000(b) expressly contemplates that national banks will consider cost, profit margin, and deterrence of misuse by customers of banking services, as well as their own competitive positions and marketing strategies in pricing service charges. Ultimately, those charges—like all other facets of national bank operations—are subject to review and regulation by the Comptroller.

The decision below is really quite extraordinary. In the absence of any allegation of anticompetitive conduct, and in the face of a federal regulation that expressly avows reliance on market forces to set service charge prices in the national banking system, the California Supreme Court has imposed a new and inconsistent standard—rooted in state contract law concepts of "unconscionability"—that constrains national banks to price their services at cost plus reasonable profit (Crocker's App. A at 35a), and permits liability to be imposed by state courts even where the price charged is equal to or below the market price (App. A at 11a). The conflict between these two standards is clear and direct: the federal regulation contemplates that pricing will be determined by the market subject to the Comptroller's statutory review, while the decision below imposes *ad hoc* review by various state courts under a standard that would permit market prices to be held "unreasonable" even absent allegations of anticompetitive conduct.

Wells Fargo is currently involved in four class action lawsuits that are virtually identical to the instant case.[2] All of these cases are presently stayed pending the outcome of this appeal. The complaints in these cases seek declaratory and injunctive relief as well as damages for various overlapping periods between 1973 and 1985. Plaintiffs seek to recover as damages all charges for non-sufficient funds (hereinafter "NSF") checks collected by Wells Fargo during this period, to the extent such charges are found to be unreasonable or unconscionable under state law. The amount of money at stake for the national banks in California is staggering. The total for all NSF charges collected by Wells Fargo alone in the 1973-85 period is approximately $140 million.

Moreover, the principle announced below is not limited to NSF charges, but may be applied to the prices charged by national banks for virtually every service and product. In the business and consumer checking areas alone (excluding collection services), Wells Fargo's pricing structure currently includes over 65 separate charges. Hundreds of other charges apply in areas such as cash management, domestic and international exchange and letters of credit, funds transfers, securities services, and collections. In short, the decision of the California Supreme Court threatens to unleash a new wave of state court actions challenging virtually every aspect of national bank operations. It simply cannot be reconciled with a national banking system in which service charge pricing is intended by federal law to be governed by market forces and uniformly reviewed in a single federal venue.

---

[2] These actions, all of which are now pending in the Superior Court of California for the City and County of San Francisco, are *Dorothy DeOliveira, etc., et al.* v. *Wells Fargo Bank, N.A., et al.* (No. 720-307); *Margaret Peterson, etc., et al.* v. *Wells Fargo Bank, N.A., et al.*, (No. 722-191); *Dee Filichia, etc., et al.* v. *Wells Fargo Bank, N.A., et al.*, (No. 820-481); and *Judy Baugh, etc., et al.* v. *Wells Fargo Bank, et al.*, (No. 820-483). All of these actions have been brought as class actions, and the *DeOliveira* case has already been certified as a class action.

SUMMARY OF ARGUMENT

Federal law charges the Comptroller of the Currency with responsibility for implementing the national banking laws. Pursuant to this mandate, the Comptroller regularly examines the pricing practices of each national bank to ensure that the "safety and soundness" of the system have not been compromised. The Comptroller has promulgated regulations setting forth guidelines to be utilized by national banks in pricing their deposit account service charges. The decision below permits state trial courts to review those charges under substantive standards that conflict with the federal standards. *Ad hoc* state court review of discrete charges levied by individual banks for particular services under a "reasonableness" standard is simply inconsistent with the federal regulatory scheme, which anticipates uniform review by the Comptroller of each national bank's integrated pricing structure and reliance on market forces to guide national banks in their service charge pricing decisions. The California Supreme Court failed to comprehend the actual and direct conflict with federal law occasioned by state court intervention in this area. Its preemption analysis is erroneous and must be reversed.

ARGUMENT

State Court Regulation of National Bank Service Charge Pricing Is Substantively And Institutionally Inconsistent With The Regulatory Scheme Established By The Federal Banking Laws.

Since *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), it has been established that the federal government may charter national banks and that such banks may be immune from state laws. While the structure of the national banking system has undergone changes since 1819, the federal interest in that system has not. "The United States has set up a system of national banks as federal instrumentalities to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositories." *Franklin National Bank* v. *New York*, 347 U.S. 373, 375 (1954).

As a national bank, Wells Fargo is subject to the National Bank Act (12 U.S.C. § 21, *et seq.*), the Federal Reserve Act (12 U.S.C. §§ 221-530), and the Federal Deposit Insurance Corporation Act (12 U.S.C. §§ 1811-32), as well as two recent banking deregulation acts (The Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221, 94 Stat. 132, and the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469). Although Crocker's Jurisdictional Statement discusses in detail the authority of the Comptroller to review and regulate national bank pricing practices pursuant to these laws, certain features of this system bear highlighting.

The Comptroller is obligated to determine whether a national bank is engaging in an "unsafe or unsound practice" and to issue cease and desist orders where such practices are found. 12 U.S.C. § 1818(b). This power is very broad:

> National banks are perhaps as meticulously regulated as any industry. Every aspect of their affairs is scrutinized to assure financial soundness and ethical practice. The Comptroller's statutory duties require the closest monitoring and continuous supervision of these institutions. Thus, the Comptroller's discretionary authority to define and eliminate "unsafe and unsound" conduct is to be liberally construed.

Independent Bankers' Ass'n of America v. *Heimann*, 613 F.2d 1164, 1168-69 (D.C. Cir. 1979) (footnote omitted), *cert. denied*, 449 U.S. 823 (1980). In addition, the Comptroller may institute civil proceedings for the forfeiture of all rights, privileges, and franchises of any national bank that violates various provisions of the National Bank Act. 12 U.S.C. § 93(a). The Comptroller may impose civil penalties upon any national bank (or officer, director, employee, or agent thereof) which (or who) violates such provisions or any *regulation* issued thereunder. 12 U.S.C. § 93(b). The Comptroller also enjoys the comprehensive visitorial powers necessary to enforce these and other banking laws. 12 U.S.C. §§ 161, 164, 481-86.

Pursuant to this statutory mandate, the Comptroller has promulgated 12 C.F.R. § 7.8000,[3] which sets forth explicit guidelines for the pricing of deposit account service charges by national banks.[4] Section 7.8000(a) expressly requires that service charges be priced by each bank on a competitive basis. Section 7.8000(b) requires

---

[3] 12 C.F.R. section 7.8000 provides as follows:

Charges by national banks.

(a) All charges to customers should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding or discussion with other banks or their officers.

(b) Establishment of deposit account service charges, and the amounts thereof, is a business decision to be made by each bank according to sound banking judgment and federal standards of safety and soundness. In establishing deposit account service charges, the bank may consider, but is not limited to considering:

(1) Costs incurred by the bank, plus a profit margin, in providing the service;

(2) The deterrence of misuse by customers of banking services;

(3) The enhancement of the competitive position of the bank in accord with the bank's marketing strategy;

(4) Maintenance of the safety and soundness of the institution.

(c) A national bank may establish any deposit account service charge pursuant to paragraphs (a) and (b) of this section notwithstanding any state laws which prohibit the charge assessed or limit or restrict the amount of the charge. Such state laws are preempted by the comprehensive federal statutory scheme governing the deposit-taking function of national banks.

[4] There is no question that the Comptroller has the authority to issue rules "defining and explicating the practices which in his discretion he finds threatening to a stable and effective national bank system." *Independent Banker's Ass'n of America* v. *Heimann*, 613 F.2d 1164, 1169 (D.C. Cir. 1979) (footnote omitted), *cert. denied*, 449 U.S. 823 (1980). Although the *Heimann* case involved a formal regulation promulgated after notice and comment and section 7.8000 is technically an interpretive regulation, the Comptroller's broad authority to define and explicate unsafe and unsound banking practices extends beyond formal notice and comment regulation. *See, e.g., First National Bank of La Marque* v. *Smith*, 610 F.2d 1258, 1263-65 & n.9 (5th Cir. 1980) (upheld informal "letter directives" stating Comptroller's opinion re unsafe and unsound practices and Comptroller's intention to act on such opinion). Moreover, this Court has stated that "great weight" should be given to the "deliberative conclusions" of the Comptroller as to the meaning of the banking laws. *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-27 (1971).

that pricing decisions be made "according to sound banking judgment and federal standards of safety and soundness." Those standards include consideration of such factors as costs, profit margin, and the deterrence of misuse by customers of banking services. 12 C.F.R. § 7.8000(b)(1) & (2). In addition, the Comptroller has recognized and endorsed the importance of considering competitive position and marketing strategy in pricing deposit account service charges. 12 C.F.R. § 7.8000(b)(3).

The program of price regulation imposed by the California Supreme Court is in direct conflict with the federal scheme.[5] Under the court's decision, national banks are permitted only to charge fees "sufficient to recover the cost of the services and a reasonable profit." (App. A at 35a). In assessing the reasonableness of the fee, courts should "consider not only the market price, but also the cost of the goods or services to the seller, the inconvenience imposed on the seller, and the true value of the produce (sic) or service," as well as "the 'procedural aspects' of unconscionability," such as "the absence of meaningful choice, the lack of sophistication of the buyer, and the presence of deceptive practices by the seller." (App. A at 11a-12a) (citations omitted). The court expressly found that a price equal to the market price can be held unconscionable, as, for example, where it is set by an oligopoly. (*Id.*). Thus, under the court's decision, prices set in response to market conditions may be declared unreasonable and hence unlawful, even though they are not the result of anticompetitive conduct.

This holding cannot be squared either with the standards set forth in section 7.8000 or with federal antitrust jurisprudence. Oligopoly, without proof of conspiracy, is

[5] Preemption may also be established in this case by Congress's intent to occupy the relevant field. In this connection, it should be noted that the court below failed to focus its preemption analysis on the relevant "field." That field is service charge price regulation, not "the field of regulation of contracts between national banks and their depositors" (App. A at 26a) or "any banking matter related to deposits." (App. A at 28a).

not unlawful under section 1 of the Sherman Act (15 U.S.C. § 1). *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954). Similarly, oligopoly or "shared monopoly" has never been held to violate section 2 of the Sherman Act (15 U.S.C. § 2) without proof of a conspiracy to monopolize. P. Areeda, *Antitrust Analysis* § 267 at 289 (3d ed. 1981); *see In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 316 (3d Cir. 1983) (summary judgment affirmed as to certain defendants for failure to prove conspiracy to acquire shared monopoly power), *cert. granted*, 105 S. Ct. 1863, 85 L.E.2d 157 (April 1, 1985); *cf. United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (offense under § 2 requires proof of the willful acquisition or maintenance of monopoly power as distinguished from growth due to superior product, business acumen, or historic accident). Creative attempts to attack oligopolistic behavior under section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) have also been rejected. *E. I. Dupont De Nemours & Co.* v. *F.T.C.*, 729 F.2d 128, 137-140 (2d Cir. 1984). While the court's discussion of unconscionability law raises numerous questions about which factors may be considered in determining "reasonableness,"[6] the thrust of the decision is unmistakable: state courts are to judge national bank service charges on the basis of a "fairness" standard that may or may not produce pricing consistent with market conditions.

---

[6] Among the considerations mentioned by the court are the following: "the commercial setting, purpose, and effect" of the charge (App. A at 10a); "the basis and justification for the price" (App. A at 11a); "the market price" (*Id.*); "the cost of the goods and services to the seller" (*Id.*); "the inconvenience imposed on the seller" (*Id.*); "the true value" of the product or service (*Id.*); "the absence of meaningful choice" (*Id.*); "the lack of sophistication of the buyer" (App. A at 12a); and "the presence of deceptive practices by the seller" (*Id.*). The presence of so many substantive standards, which in themselves conflict with the court's central test of cost plus a reasonable profit, injects tremendous uncertainty into bank pricing decisions and bank management generally. Such uncertainty in itself frustrates the purposes of the national banking laws; few matters could be more threatening to the safety and soundness of the national banking system than uncertainty of the magnitude now faced by national banks operating in California.

The "reasonable profit" standard—typically used in public utility ratemaking—cannot appropriately be applied to regulate service charge pricing in the national banking system. Public utilities are considered natural monopolies whose services can be efficiently allocated only by setting prices equal to actual cost plus a reasonable rate of return on investment. *See generally, Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 595-96 (1976); *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86, 92 (1953). No similar contention has been made—or can be made—regarding the banking industry. Indeed, plaintiffs have not even alleged anticompetitive conduct. The decision below, if permitted to stand, would prevent national banks from pricing their services at the market rate if a state trial court finds, for example, that the rate does not reflect the "true value" of the service.[7] (App. A at 11a). This standard simply cannot be made to fit within a program of federal regulation that relies upon market conditions to shape pricing decisions and assure the safety and soundness of the system.

As the court below acknowledged, the two recent banking deregulation acts evidence Congress's intention to end the subsidy of depositor services that had resulted from federal limits on the interest that could be paid to depositors, and to enable banks to charge fees sufficient to recover the cost of those services. (App. A at 35a). Congress plainly contemplated that such deregulation would lead to increased competition in the pricing of national bank services (*see* citations in Crocker's Jurisdictional Statement at 19-20), and section 7.8000 reflects this intended reliance on market forces, subject to the Comptroller's supervisory authority. Although the court below dismissed actual conflict between the federal regulation and its "reasonableness" standard as "a remote and unlikely possibility" (App. A at 34a), such conflict is inherent. National banks can price like competitors responding to market conditions or they can price like

[7] In addition, the decision may directly impair the safety and soundness of a national bank by removing a needed deterrent to NSF check writing. 12 C.F.R. § 7.8000(b)(2).

regulated utilities; they cannot do both. The court's argument that the dual system of bank regulation would be destroyed by a finding of preemption based on the possible interpretations of federal law by bank directors (*id.*) is misplaced; the "reasonableness" standard promulgated below substitutes regulation for competition as the price-setting mechanism and permits liability to be imposed for pricing that responds to market conditions, thereby raising an actual conflict with the standards set forth in the Comptroller's regulation.

Beyond this conflict in substantive standards, implementation of those standards by common law courts would frustrate the purposes and efficacy of federal regulation. Unlike administrative ratemaking, which is undertaken pursuant to procedures that assure uniformity in the review and establishment of rates and the recapture of all utility costs, piecemeal review by various state courts will inevitably result in disparate rulings on various challenged prices, making it impossible for national banks to develop an integrated pricing strategy that assures their sound and efficient operation. Thus, Wells Fargo may find that it has failed to recover all of its costs when different triers of fact, considering challenges to particular service charges, allocate costs differently in applying the "reasonableness" standard to the challenged prices.[8] The problem is compounded for Wells Fargo, which operates in forty-four California counties, and will face a different trier of fact in each county where it is sued. Moreover, national banks may now find that many of their costs are unrecoverable because of the practical difficulties in accounting for them, given that detailed historical cost data has not heretofore been required.

The decision below also threatens to impair the market's efficient operation, since different banks will be

[8] This very problem is posed in *Filichia, etc., et al.* v. *Wells Fargo Bank, N.A., et al.*, where plaintiffs are challenging the bank's "deposited item returned charge," which is imposed on the account of a payee who deposits someone else's NSF check. The cost items relating to this charge may partially overlap those relating to NSF charges, especially when both drawer and drawee are customers of the same bank.

subject to review of their charges by different triers of fact, and thus will be made to operate under different pricing standards. At best, state courts will validate as "reasonable" prices that have been established in response to market conditions; more likely, the result will be a patchwork of pricing decisions reflecting the views of particular triers of fact as to what constitutes "fairness" in this consumer setting. Undoubtedly, some banks will be enjoined from charging competitive prices. This lack of uniformity contrasts starkly with the federal scheme, where national bank examination and review is carried out by a single agency—the Office of the Comptroller of the Currency.[9]

The scheme established below also conflicts with past federal regulation because it operates retrospectively. As noted below, Wells Fargo is now facing challenges to all of the NSF charges it has collected since 1973, totalling approximately $140 million. To require Wells Fargo to disgorge those sums would upset years of federal regulation involving regular examination by federal officials as well as consultation regarding and approval of pricing. The impact of retroactivity on the safety and soundness of national banks is especially severe because the banks cannot now recover those charges in other ways. Wells Fargo no doubt would have adopted very different marketing strategies had it known that it could be subjected to the law made below. Even beyond the retroactivity problems caused by the cases now pending, price regulation by common law courts would, by its very nature, impose delays that frustrate business planning and are inconsistent with the purposes of federal banking law, which requires certainty in order to assure safety and soundness.

---

[9] The uniformity problem is compounded by the fact that there is no uniform industry-wide system of accounting to show each bank's cost of processing NSF checks. This does not pose a problem for the federal regulator. The Comptroller uses expert bank examiners who conduct regular, detailed examinations of all national bank operations. It does pose problems for state trial courts, each of which would be required to assess the costs of individual banks.

In sum, the *ad hoc* price evaluation scheme established by the decision below is inconsistent, both substantively and institutionally, with the type of regulation established by the federal banking statutes and the regulations, policies and practices of the Comptroller. Congress has sought to achieve a safe and sound national banking system by deregulating interest rates and promoting competition among national banks in the pricing of their services and products. The highest court of the State of New York has already held that federal law preempts state law challenges to the pricing of national bank service charges. *Jacobs* v. *Citibank, N.A.*, 61 N.Y.2d 689, 462 N.E.2d 1182, 474 N.Y.S.2d 464 (1984). The holding of the court below simply cannot be reconciled with federal regulation in this area.

CONCLUSION

For the foregoing reasons, Wells Fargo respectfully submits that the decision below is contrary to federal law and is appealable under 28 U.S.C. section 1257(2), or, in the alternative, presents federal questions so substantial as to merit this Court's review by writ of certiorari under 28 U.S.C. section 1257(3). The decision of the California Supreme Court should be reversed.

RESPECTFULLY SUBMITTED,

WEYMAN I. LUNDQUIST*
ROBERT E. BORTON
PETER A. WALD
BRIAN P. BROSNAHAN

HELLER, EHRMAN, WHITE & MCAULIFFE
44 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 772-6000

Attorneys for Amicus Curiae Wells Fargo Bank, N.A.

* Denotes Counsel of Record